

**IN THE SUPERIOR COURT  
OF THE STATE OF DELAWARE**

FRED S. SILVERMAN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 10400  
WILMINGTON, DELAWARE 19801  
(302) 255-0669

Submitted: November 21, 2005  
Decided: February 27, 2006

STATE OF DELAWARE,	)	
	)	
v.	)	CA.#05A-02-007-FSS
	)	
TERRI DONAHUE,	)	
	)	

**ORDER**

**Upon Appeal from the Industrial Accident Board -- *AFFIRMED***

Employer, the State of Delaware, appeals from the Industrial Accident Board's November 5, 2004 decision awarding compensation to an employee, Terry Donahue. Relying heavily on a time-lapse, video surveillance, tape recording, the State contends that the Board's decision is indisputably against the weight of the evidence. Alternatively, the State asks for remand so that it can tie its medical expert's opinion to the video tape.

**I.**

On May 12, 2004, Donahue was working as a supervisor for the

Department of Transportation, in a toll plaza's control center. While sliding a heavy bag of coins to a safe, she felt "three pops in her back." One of her legs and one of her feet went numb. So, she asked a co-worker to help her finish moving the bag. Donahue hoped that "it would pop back in" and she "didn't want to over-react." The pain was bearable. "It started getting warm and throbbing." Donahue was concerned about making a fuss "because [she] felt tension in the room because people talk and [she] didn't want to tell them that [she] hurt [her] back. . . ." Although she mentioned her problem to the co-worker, who helped her with the bag as requested, and she eventually mentioned the problem to another co-worker, she tried to finish her shift quietly. Donahue declined to fill out a report on what happened. Two days later, Donahue saw her doctor. He ordered testing and put her on disability.

## **II.**

Donahue's back problems actually began at work in 2002, when she was hurt working in a toll booth. After some time off, she returned to work in February 2003. Donahue's neurologist opined that Donahue's disabling complaints stemmed from the May 2004 accident, which may have aggravated the injuries from 2002.

Based on Donahue's physical examination and her test results after the 2004 incident, the neurologist diagnosed Donahue with lumbar scaral radiculopathy and sacroiliac dysfunction. He prescribed various medicines and treatment.

Throughout the summer of 2004, the neurologist put Donahue on various work restrictions.

Essentially, based on objective and subjective findings, Donahue's neurologist supported her claim for her compensation. So did her husband, who testified, basically, that she was doing well before she lugged the coins, and poorly afterwards.

The State called an orthopedic surgeon, who had initially concluded that Donahue's injury was work-related and her post-injury EMG showed recent trauma. Nevertheless, he testified against Donahue. The State also presented co-workers, who testified that Donahue did not appear injured on the day in question. One co-worker, however, confirmed Donahue's testimony that she asked him to finish sliding the bag of coins across the floor for her.

### **III.**

Most significantly for present purposes and as mentioned, the State presented a time-lapse surveillance tape. After reviewing the record on appeal, the court held oral argument so that the court could view the video tape, which required special equipment. To appreciate the tape, it has to be seen.

In summary, the tape is comprised of images collected from several video cameras, located in various places throughout the toll plaza. A multiplexer

takes the video feed, camera-by-camera, and channels it to the recorder. The recorder captures, one-by-one, the images fed to it. As to each camera, the video tape is, in effect, a time-lapse recording. In other words, the video recorder captures a few moments from a particular camera, and then it does the same for all the other cameras. Eventually, several seconds later, it returns to the first camera's feed and records a few more moments, and so on. The intervals are not regular.

The video tape shows Donahue sitting in various positions or moving around the control room. At one point, she is in the safe room. The video tape does not show Donahue wincing, or otherwise acting as if she were in great pain. Neither side, however, asked its expert to view the video tape and compare it with his opinion. Instead, the State argued to the Board, as it does on appeal, that Donahue's movements and positioning are inconsistent with her alleged injuries and her medical expert's opinions.

Having viewed the video tape, the court understands the State's point. As mentioned, Donahue appears to move around and she does not appear to be acutely injured. The court, however, also sees why the Board was not swayed by the video tape. The tape tends to confirm that Donahue was at the safe and it generally supports her chronology. The tape also shows Donahue sitting passively for much of the shift, which is consistent with her complaints after the incident.

Most importantly, while the tape does not overtly support Donahue's claim she was injured, it does not clearly refute that claim, either. No one, besides Donahue, knows how she looked during the many moments when the camera was not recording her. Moreover, as mentioned, neither medical expert looked at the tape and testified that what it recorded was helpful. Thus, the Board was left to compare, on its own, what the tape revealed with what the doctors said. Discounting the video tape due to its gaps, the case largely boiled down to a traditional battle of experts. The Board had ample evidence to side with Donahue's expert, starting with the fact that the State's medical expert partially supported her claim, and moving on from there.

#### IV.

After viewing the video tape at oral argument, the court voiced concern about the fact that neither expert commented to the Board about the video tape's significance. The court questioned whether the case could be remanded, and it allowed supplemental submissions toward that end. The State filed supplemental argument, suggesting that the court had authority to remand so that the Board could hear more from the experts.<sup>1</sup> The State, however, did not attach an affidavit from its expert supporting the argument that if the case were remanded, the expert would point

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<sup>1</sup> *Jackson v. Ametek*, Del. Super., C.A. No. 94A-08-004, Carpenter, J. (Jan. 31, 1986)(ORDER).

to something on the video tape that was medically inconsistent with Donahue's alleged injury. Thus, the benefit of a remand is, at best, theoretical.

Even if the State's supplemental submission had included a proffer, it is unlikely that the court would remand. Litigants are expected to present their best cases at the first opportunity. Having failed to present enough evidence during a first go-around, parties are not entitled to a second hearing in order to do better.<sup>2</sup> Furthermore, the court is satisfied that a second hearing would probably reach the same result, considering all the evidence supporting Donahue's position, including objective test results, and assuming the likelihood of opposing, expert opinion.<sup>3</sup>

## V.

In summary, the State presented substantial evidence from which the Board could have rejected Donahue's claim. The court sees the State's point.<sup>4</sup> Donahue, however, presented substantial evidence supporting the Board's decision. And that takes into account the video tape. Although she was doing OK before the 2004 incident, she had a bad back. On the day in question, she was on the job,

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<sup>2</sup> See *Anderson v. General Motors Corp.*, 748 A.2d 406 (Del. 1999).

<sup>3</sup> *Gallo v. Industrial Accident Board*, Del. Super., C.A. No. 096A-11-003, Ridgely, P.J. (June 17, 1997)(ORDER); *Joyner v. Chrysler Motors Corp.*, C.A. No. 87A-AP-3, Babiarz, J. (May 11, 1989)(Mem. Op.).

<sup>4</sup> *MBNA America Bank, N.A. v. Brooks*, Del. Super., C.A. No. 04A-12-005, Silverman, J. (Aug. 25, 2005)(ORDER).

struggling with a very heavy object. She says she was hurt and her doctor then found signs of recent trauma. That, and the rest of the record, makes out a claim for workers' compensation, supported by substantial evidence.

**VI.**

For the foregoing reasons, and as discussed during oral argument on November 7, 2005, the Board's November 5, 2004 decision awarding compensation is ***AFFIRMED***.

**IT IS SO ORDERED.**

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Judge

oc: Prothonotary (Appeals Division)  
pc: John J. Klusman, Esquire  
Susan A. List, Esquire  
Paul A. Wernle, Jr., Esquire